

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION**

DORA MCNAIL,

Plaintiff,

v.

KANSAS CITY PUBLIC SCHOOLS,

Defendant.

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Case No. 4:18-cv-1004-FJG

MOTION TO DISMISS PURSUANT TO FED. R. CIV. P. 25(a)(1)

Defendant Kansas City Public Schools (“KCPS”), by and through counsel, moves to dismiss this case pursuant to Federal Rule of Civil Procedure 25(a)(1), and in furtherance thereof states as follows:

1. This matter was commenced when Plaintiff filed her Petition in the Circuit Court of Jackson County, Missouri (the “State Court”) on or about July 17, 2018. KCPS was first served on November 28, 2018.

2. On December 3, 2018, Plaintiff filed in the State Court, and served upon Defendant KCPS, a Suggestions of Death indicating that the Plaintiff had died on October 10, 2018.

3. KCPS timely removed this action from the State Court to this Court by filing a Notice of Removal on December 21, 2018. In accordance with 28 U.S.C. § 1446(a), KCPS included with its Notice of Removal a copy of the Plaintiff’s Suggestions of Death. *See* Exhibit A to KCPS’s Notice of Removal (Docket no. 1) at pg. 18.

4. Federal Rule of Civil Procedure 25(a)(1) permits for substitution of a party in the event of death via motion by either another party or the decedent’s successor or representative.

It further provides, however, that if no such motion is “made within 90 days after service of a statement noting the death, the action by or against the decedent must be dismissed.” Fed. R. Civ. P. 25(a)(1) (emphasis added).

5. More than 90 days have now passed since the Suggestions of Death in this matter were served on December 3, 2018, and no motion to substitute a party has been made.

6. Federal Rule of Civil Procedure 25 applies to this matter. Fed. R. Civ. P. 81(c)(1) (“These rules apply to a civil action after it is removed from a state court.”) However, even if state rules of civil procedure applied, the result would be the same. *See*, Mo. Supreme Court Rule 52.13(a)(1) (“Unless a motion for substitution is served within 90 days after a suggestion of death is filed, the action shall be dismissed. . . .”).

7. The requirement of the rule leaves no discretion: where more than 90 days have elapsed without a motion to substitute, the action “must be dismissed.” Fed. R. Civ. P. 25(a)(1); *accord*, *Kaubisch v. Weber*, 408 F.3d 540, 542 (8th Cir. 2005) (absent a proper motion to extend time, dismissal after 90 days is “mandatory”).

WHEREFORE, Defendant Kansas City Public Schools prays this Court dismiss this action in full, and grant such other and further relief as may be just in the premises.

Respectfully submitted,

KANSAS CITY PUBLIC SCHOOLS

By: /s/ Jeff Klusmeier

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ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on April 11, 2019, he electronically filed the foregoing with the Clerk of the Court using the court's CM/ECF system, which sent notice of the same to all parties of record.

/s/ Jeff Klusmeier

Attorney for Defendant